David Chelliah @ Kovilpillai Chelliah David v Monorail Malaysia Technology Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–1068 OF 2004
MOKHTAR SIDIN, RICHARD MALANJUM AND NIK HASHIM JJCA
3 DECEMBER 2004

Civil Procedure — Damages — Assessment of damages — Interim payment — Appellant sustained serious injuries involving respondent — Action for damages instituted — Application for interim payment pending conclusion of trial — Balance of probabilities — Likelihood of appellant succeeding in claim for substantial damages if action proceeded to trial — Whether brain damage would give rise to substantial damages being awarded — Rules of the High Court 1980 O 22A r3(1)(c)

The appellant had suffered serious head injuries as a result of being hit on the head by a safety wheel which fell off of a monorail train on a test run whilst he was crossing a road. He filed an action against the respondents for their negligence in operating the monorail train and claimed general damages in the sum of RM5,000,000 and special damages. The respondents disputed the claim. Pending the trial, the appellant filed an application for an interim payment of RM250,000 in respect of damages pursuant to O 22A of the Rules of the High Court 1980 (the 'RHC'). The High Court judge dismissed the appellant's application on two grounds, ie: (i) the appellant had not proven that his condition had deteriorated in the two years since the accident; and (ii) should the matter proceed to trial and the respondents succeed in their defence of '*novus actus interveniens*', the respondents would be absolved from liability altogether or at the very least their share of responsibility would be reduced accordingly and thus, the appellant would not be able to obtain substantial damages. The appellant appealed.

Held, allowing the appeal with costs:

(1) The purpose of O 22A is to provide an interim payment to alleviate a plaintiff's hardship during the period before trial. There is no necessity for the appellant to make out a case that his condition had deteriorated so that an interim payment is needed to meet a worsening medical condition. Order 22A is available to any plaintiff and not limited only to those whose condition is deteriorating (see para 17).

(2) The statement of claim indicated that should the appellant succeed in his claim, he would be entitled to substantial damages. The medical report proved that the appellant had suffered severe brain damage as a result of the accident and the court has generally recognized brain damage as giving rise to 'substantial damages'. Therefore, the trial judge had erred when he failed to properly appreciate that the present case falls within the

'substantial damages' category and instead confined himself to determining whether there has been deterioration in the appellant's condition since the accident (see para 18).

(3) On the question of liability, the High Court judge failed to have regard to the type of accident by which the appellant suffered his injuries. It was a type of accident which clearly called for the respondents to explain how the safety wheel could have dislodged and dropped on the appellant, a *res ipsa loquitur* situation — where in the absence of explanation by the respondents, negligence may be inferred (see para 19).

(4) There was no basis in law for the trial judge to conclude that in the event the respondents succeeded in their defence of '*novus actus interveniens*', the respondents would be absolved from liability altogether or that damages would be substantially reduced (see para 20 and 21).

(5) In the instant case, the appellant's claim for RM250,000 for an interim payment under O 22A was rather excessive. A sum of RM50,000 would be more reasonable (see para 22).

[**Bahasa Malaysia summary**

Perayu mengalami kecederaan kepala yang serius kerana terkena roda keselamatan yang tercabut dari kereta api monorail semasa kereta api tersebut diuji pandu ketika beliau sedang melintas jalan. Beliau memfailkan satu tindakan terhadap responden-responden kerana kecuaian mereka dalam mengendalikan kereta api monorail tersebut dan menuntut ganti rugi umum sebanyak RM5,000,000 dan ganti rugi khas. Responden-responden menyangkal tuntutan tersebut. Sementara menunggu perbicaraan, perayu memfailkan satu permohonan untuk bayaran interim sebanyak RM250,000 di bawah A 22A Kaedah-kaedah Mahkamah Tinggi 1980 (KMT). Hakim Mahkamah Tinggi menolak permohonan perayu atas dua alasan, iaitu: (i) perayu tidak membuktikan bahawa keadaannya semakin teruk dalam dua tahun selepas kemalangan tersebut; dan (ii) jika perkara ini dibicarakan dan responden-responden berjaya di dalam pembelaan '*novus actus interveniens*', pihak responden akan dibebaskan dari liabiliti sama sekali atau sekurang-kurangnya tanggungjawabnya akan terkurang, maka dari itu, perayu tidak akan mendapat ganti rugi yang besar. Perayu merayu.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tujuan A 22A adalah untuk memperuntukkan bayaran interim bagi mengurangkan kesengsaraan plaintif semasa menunggu perbicaraan. Tidak terdapat sebarang syarat yang memerlukan perayu untuk menunjukkan bahawa keadaannya semakin teruk yang memerlukan bayaran interim bagi membiayai keadaan perubatan yang semakin teruk. Aturan 22A sedia

ada kepada mana-mana plaintif dan tidak terhad hanya kepada mereka yang keadaannya semakin merosot (lihat perenggan 17).

(2) Pernyataan tuntutan menunjukkan sekiranya perayu berjaya di dalam tuntutannya, beliau berhak kepada ganti rugi yang besar. Laporan perubatan menunjukkan yang perayu mengalami kecederaan otak yang teruk disebabkan oleh kemalangan tersebut dan mahkamah secara amnya mengiktiraf bahawa kecederaan otak akan mendapat ganti rugi yang besar. Oleh yang demikian, hakim bicara telah silap apabila beliau gagal menyedari yang kes semasa tergolong di dalam kategori 'ganti rugi besar' dan sebaliknya mengehadkan dirinya untuk memutuskan sama ada terdapat kemerosotan di dalam keadaan perayu semenjak kemalangan (lihat perenggan 18).

(3) Dalam persoalan liabiliti, hakim Mahkamah Tinggi telah gagal untuk mengambil kira jenis kemalangan di mana perayu telah mengalami kecederaannya. Kemalangan ini merupakan satu kemalangan yang jelas memerlukan responden-responden untuk menjelaskan bagaimana roda keselamatan tersebut boleh tercabut dan jatuh di atas perayu, satu keadaan *res ipsa loquitur* — di mana ketiadaan penjelasan dari responden-responden, membolehkan kecuaian diandaikan (lihat perenggan 19).

(4) Tidak terdapat sebarang asas dalam undang-undang untuk hakim bicara memutuskan bahawa jika responden-responden berjaya dalam pembelaan '*novus actus interveniens*' mereka, mereka akan terbebas dari liabiliti sama sekali atau ganti rugi akan terkurang dengan banyaknya (lihat perenggan 20 dan 21).

(5) Di dalam kes semasa, tuntutan perayu untuk RM250,000 bayaran interim di bawah A 22A adalah keterlaluan. Jumlah sebanyak RM50,000 adalah lebih berpatutan (lihat perenggan 22).]

Notes

For cases on assessment of damages, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1919–1927.

Cases referred to

Barkway v South Wales Transport Co Ltd [1950] 1 All ER 392 (refd)
Dr Yusuff bin Hj Mansur v Changkat Jering Sdn Bhd & Anor [1997] 5 MLJ 530 (refd)
H West & Son Ltd v Shephard [1964] AC 326 (refd)
Jamil bin Harun v Yang Kamsiah & Anor [1984] 1 MLJ 217 (refd)
Lim Poh Choo v Camden and Islington Area Health Authority [1979] 2 All ER 910 (refd)
Mediahouse Sdn Bhd v Koh Kim Suan [1998] 3 AMR 2338 (refd)
Ricci Burns Ltd v Toole & Anor [1989] 3 All ER 478 (refd)
Schott Kem Ltd v Bentley & Ors [1990] 3 All ER 850 (refd)

A *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd* [1987] 2 All ER 181 (refd)
Stringman v McArdle [1994] 1 WLR 1653 (refd)

Legislation referred to

B Rules of the High Court 1980 O 22A r 3(1)(a), (b), (c)
Rules of the Supreme Court [UK] O 29 rr 9, 11, 12

Appeal from: Civil Suit No 21–72 of 2003 (High Court, Kuala Lumpur)

C *Cyrus V Das (Steven Thiru with him) (Shook Lin & Bok) for the appellant.*
Tunku Farik Ismail (T Tharumarajah with him) (Azim Tunku Farik & Wong) for the respondents.

Nik Hashim JCA (delivering judgment of the court):

D

BACKGROUND

[1] At about 5.20pm on 16 August 2002, the appellant, a 40-year old senior journalist with Bernama, was hit on his head by a 13.4kg safety wheel which fell off of a monorail train on a test run whilst he was crossing the road at Jalan
E Sultan Ismail, Kuala Lumpur. He suffered serious head injuries as a result.

[2] As a result of those injuries he suffered, the appellant filed a civil suit against the respondents for their negligence in operating the monorail train. In the statement of claim, the appellant claimed general damages in the sum of RM5,000,000 and special damages. In their defence, the respondents disputed
F the claim and alleged that the injuries suffered by the appellant were caused wholly or partly due to his own negligence.

[3] Pending the trial of his action, the appellant filed an application for an interim payment of RM250,000 in respect of damages pursuant to O 22A of
G the Rules of High Court 1980 (the RHC).

[4] On 20 September 2004, the learned High Court judge dismissed the appellant's application essentially on two grounds:

(i) the appellant had not proven that his condition had deteriorated in the
H two years since the accident; and

(ii) the learned judge had found that should the respondents succeed in their defence of *novus actus interveniens* (that the safety wheel came off as a result of deliberate intervention by person or persons unknown or as yet unidentified), the respondents would be absolved from liability altogether
I or at the very least their share of responsibility would be reduced accordingly and thus, the appellant would not be able to obtain substantial damages if the matter proceeded to trial.

[5] Dissatisfied by the said decision, the appellant now appealed to this court.

[6] On 23 November 2004, we allowed the appeal with costs here and below and made an order that an interim payment of RM50,000 be awarded in favour of the appellant. We also made an order that the deposit be refunded to the appellant.

ORDER 22A OF THE RHC

[7] Order 22A was introduced in the RHC by the Rules of the High Court (Amendment) (No 2) 1993 vide PU(A) 192/93 with effect from 1 August 1993. It followed the view expressed by Lord Scarman in *Jamil bin Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217 that Malaysia had no provision similar to O 29 r 9, 11 and 12 of the English RSC. In that case one of the plaintiffs was a seven-year old infant from a lower income background who suffered severe brain injuries as a result of an accident (liability was admitted by the defendant), required medical and lifelong nursing care and supervision. The matter went on appeal to the Privy Council on the assessment of damages. His Lordship, in delivering the judgment of the board at p 221 said:

> Their Lordships cannot leave this case without commenting on two unsatisfactory features … as their Lordships understand the position, no power exists in a case where the liability is admitted for an interim payment to be ordered pending a final decision on quantum of damages … it would seem legislation may be needed to enable an interim award to be made. (see *Malaysian High Court Practice* 2001 Desk Edition 1 pp 770–790).

[8] Order 22A r 1 provides as follows:

> interim payment, in relation to a defendant, means a payment on account of any damages, debt or other sum (excluding costs) which he may be held liable to pay to or for the benefit of the plaintiff ….

[9] Thus, under this rule the court may, on an application by the plaintiff, order interim payment be made pending the outcome of the civil suit.

[10] In the present appeal for the appellant to succeed, the appellant has to satisfy the court the requirements laid down under O 22A r 3(1) of the RHC which states:

(a) that the defendants (respondents) have admitted liability for the appellant's damages; or

(b) that the appellant has obtained judgment against the respondents for damages to be assessed; or

(c) that, if the action proceeded to trial, the appellant would obtain judgment for substantial damages against the respondents.

[11] Order 22A r 3(1) of the RHC also provides that should the appellant be able to satisfy the court of any one of the requirements mentioned above,

A the court, may, if it thinks fit order the respondents to make an interim payment of such amount as it thinks just, not exceeding a reasonable proportion of the damages which in the opinion of the court are likely to be recovered by the appellant after taking into account of any relevant contributory negligence and any set-off, cross-claim or counterclaim on which the respondents may
B be entitled to rely.

[12] The standard of proof required in an application for interim payment is on the balance of probabilities and not beyond reasonable doubt (see *Mediahouse Sdn Bhd v Koh Kim Suan* [1998] 3 AMR 2338 which followed *Ricci Burns Ltd v Toole & Anor* [1989] 3 All ER 478).

C

[13] English case law and commentary make it clear that the underlying purpose of O 22A is to provide for an interim payment to alleviate a plaintiff's hardship which may exist during the period from the commencement of an action to the conclusion of the trial: see *Shearson Lehman Bros Inc v Maclaine Watson & Co Ltd* [1987] 2 All ER 181 at p 190 where the English Court of
D Appeal also observed that when construing the rule, the court should be slow to adopt a construction that would defeat the evident purpose of the rule. (see also *Halsbury Laws of Malaysia* Vol 1 (2002 Reissue) at p 552; Civil Procedure Rules (UK) p 513). Further, there is no necessity for the plaintiff to show that he would suffer prejudice if he did not obtain an interim payment (*Schott Kem Ltd*
E *v Bentley & Ors* [1990] 3 All ER 850); neither must he show that a particular sum is required to cover a need (*Stringman v McArdle* [1994] 1 WLR 1653). In awarding an interim payment, the court is not concerned with how the money is to be spent (*Stringman*, supra).

F THE FINDINGS

[14] It is not disputed that in the present appeal the respondents have not admitted liability. In para 5 and 6 of their statement of defence, the respondents categorically denied liability and put the appellant to strict proof thereof. It is also noted that the appellant has not obtained judgment against the
G respondents for damages to be assessed. Therefore, in our view, the appellant could not make a case for an interim payment against the respondents under O 22A r 3(1)(a) or (b).

[15] However, on the balance of probabilities, we were satisfied that there
H were sufficient materials to support the appellant's application for an interim payment under O 22A r 3(1)(c) that is, if the action proceeded to trial, the appellant would obtain judgment for substantial damages against the respondents.

[16] In the instant case, the appellant was crossing the road at Jalan Sultan Ismail on the fateful day when the safety wheel of a monorail train travelling
I overhead fell off and landed on his head. The appellant felt unconscious and suffered severe brain damage described in the KLGH medical report at p 367 of the record of appeal as 'very serious injury':

… his injuries were in no way mild. This was a very serious injury. The nature of the impact was such that he could have died immediately as a result of head or spinal injuries. The brain hematoma was an immediate threat to his life and therefore had to be removed. We saw eight fracture fragments at craniotomy ….

Direct brain injury caused his left hand weakness and this could be permanent. The bifrontal contusions seen on the CT and the extruding brain seen in this area further attest to the serious trauma delivered to this part of his brain. This can result in serious cognitive impairment and expose him to the risk of seizures which may sometimes manifest years later.

The fractures through the base of his skull put him at risk of developing yearslater. This can lead to meningitis or the development of brain abscesses. MrKovilpillai Chelliah David has survived a very serious injury.

sgd

Mr Ravi Krishnapillai

MBBS (Mal) FRCSED (Neurosurgery)

Pakar Bedah Otak dan Saraf

Jabatan Bedah Otak dan Saraf

Hospital Kuala Lumpur

[17] In refusing the appellant's application, the learned judge was of the view that the appellant would not obtain judgment for substantial damages at trial later because the appellant had not proven that his condition had deteriorated in the two years since the accident. With respect, we did not agree with the learned judge. We agreed with the learned counsel for the appellant that the learned judge misunderstood the purpose of O 22A and its application. As adverted to earlier, the purpose of O 22A is to provide an interim payment to alleviate a plaintiff's hardship during the period before trial. There was no necessity for the appellant to make out a case that his condition had deteriorated so that an interim payment was needed to meet a worsening medical condition. It is worthy of note that O 22A is available to any plaintiff and not limited only to plaintiff whose condition is deteriorating.

[18] In our view, the statement of claim shows that if the appellant succeeds in his claim, he would be entitled to substantial damages. The medical report shows that the appellant had suffered severe brain damage as a result of the accident. Brain damage is generally recognized as giving rise to 'substantial damages' (see Lord Pearce in *H West & Son Ltd v Shephard* [1964] AC 326 at 365) or 'substantial loss' (see Lord Scarman in *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910 at 919). Further, the appellant is a 'conscious sufferer' who would suffer more than a victim who is brain-dead or comatose (see *Dr Yusuff bin Hj Mansur v Changkat Jering Sdn Bhd & Anor* [1997] 5 MLJ 530). In our view, the learned judge was in error when he failed to properly appreciate that the present case falls within the 'substantial damages'

A category and instead confined himself to determining whether there has been deterioration in the appellant's condition since the accident.

[19] On the question of liability, obviously the High Court failed to have regard to the type of accident in which the appellant suffered his injuries. It
B was a type of accident which clearly called for the respondents to explain how the safety wheel could have dislodged and dropped on the appellant, a *res ipsa loquitur* situation — where in the absence of explanation by the respondents, negligence may be inferred (see *Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392 HL).

C **[20]** In this appeal, the respondents pleaded an act of an unknown third party or parties as responsible for the dislodgment of the safety wheel but there is no averment in respect of this third party intervention. Yet the learned judge seemed to have concluded on this point alone that damages would be substantially reduced because of *novus actus interveniens* or third party intervention.
D In this regard, we agreed with the appellant that the learned judge was not entitled and therefore erred in law to so conclude based on the available material which was not as yet tested at that stage.

[21] Further, it must be noted that the fourth defendant, the Railway Director
E General, in his statement of defence (see paras 21(a) to (d) at pp 94 to 95 of the appeal of record) has alleged that the present respondents (first and second respondents) were negligent in operating the monorail train without ensuring that the safety wheel was duly fastened or ensuring proper security measures were taken to prevent third party tampering. At this stage, though the fourth
F defendant was blaming the respondents or third party for the negligence, the fact remains that the appellant was an unfortunate victim of the negligence. Thus, there was no basis in law for the learned judge to conclude that in the event the respondents succeeded in their defence of *novus actus interveniens*, the respondents would be absolved from liability altogether or that damages would
G be substantially reduced.

[22] The basis of the appellant's claim for RM250,000 interim payment was that he would recover substantial damages at the trial of his action for negligence. The respondents, however, contended that any award to compensate the appellant if he succeeded at the trial, would not exceed a sum in the region
H of RM50,000 to RM60,000 based on the current trend of authorities. For that reason the respondents suggested an interim payment of RM20,000 to be a fair figure. In our view, the sum offered was too low. Therefore, in the circumstances of this case and based on the available evidence and the current authorities on comparable damages, we are of the opinion that the appellant
I would be able to recover substantial damages exceeding RM50,000 if the matter proceeded to trial. However, in this case, the appellant's claim for RM250,000 for an interim payment under O 22A was rather excessive. A sum of RM50,000

would be more reasonable. In the exercise of our discretion, we made the orders accordingly.

Appeal allowed.

Reported by Izzaty Izzuddin

A

B

C

D

E

F

G

H

I